Supreme Court, U. S.
FILED
NOV 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5176

JEROME FRANKS,

Petitioner,

v.

THE STATE OF DELAWARE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF DELAWARE

BRIEF FOR PETITIONER

DONALD W. HUNTLEY
Assistant Public Defender
Legal Department
E. I. du Pont de Nemours & Company
Wilmington, Delaware 19898

Attorney for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
CITATION TO THE OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	3
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
I. EVIDENCE SEIZED CONTRARY TO THE FOURTH AMENDMENT CANNOT BE INTRODUCED AT TRIAL	5
II. FALSE AFFIDAVITS SUPPORTING A SEARCH WARRANT DO VIOLENCE TO THE FOURTH AMENDMENT AT LEAST EQUAL TO THE INSUFFICIENCY OF A SEARCH WARRANT AFFIDAVIT	6
III. JUDICIAL REVIEW OF THE TRUTH OF AN AFFIDAVIT SUPPORTING A SEARCH WARRANT IS ESSENTIAL TO GIVE MEANING TO THE FOURTH AMENDMENT GUARANTEES	7
IV. THE ARGUMENTS ADVANCED AGAINST SUCH REVIEW FAIL TO WITHSTAND SCRUTINY	9
V. THE PROPOSED ALTERNATIVES TO A FULL ADVERSARY DETERMINATION OF PROBABLE CAUSE AT A SUPPRESSION HEARING ARE PATENTLY UNSATISFACTORY	11
VI. A REQUIREMENT FOR A PRELIMINARY SHOWING OF FALSITY WOULD IMPOSE AN UNREASONABLE BURDEN ON A DEFENDANT	12

Page

VII. THE EVIDENCE INTRODUCED IN VIOLATION OF THE PETITIONER'S FOURTH AMENDMENT RIGHTS SIGNIFICANTLY PREJUDICED HIS CAUSE 14

CONCLUSIONS 15

TABLE OF AUTHORITIES

Cases:

Gerstein v. Pugh, 420 U.S. 103, 112-114 (1975) 6

Gracie v. United States, 15 F.2d 644 (1st Cir.), cert. den., 237 U.S. 748 (1926) 7

Kenney v. United States, 157 F.2d 442 (D.C. Cir. 1946) 7

King v. United States, 282 F.2d 398, 400 (4th Cir. 1960) 7,15

Mapp v. Ohio, 367 U.S. 643 (1961) 5,11

People v. Mitchell, 45 Ill. 2d 148, 155, 258 N.E.2d 345, 349, cert. den., 400 U.S. 882, 91 S. Ct. 117 (1970) 9

Smith v. State, 191 Md. 329, 62 A.2d 287, cert. den., 336 U.S. 925, 69 S. Ct. 656 (1949) 9

State of New Hampshire v. Spero, 371 A.2d 1155, 1158 (1977) 7

State v. Petillo, 61 N.J. 165, 174, 293 A.2d 649, 653 (1972), cert. den., 410 U.S. 945 (1973) 10

Tucker v. State of Maryland, 224 A.2d 111 (1966) 9

United States v. Belculfine, 508 F.2d 58 (1st Cir. 1974) 13

United States v. Carmichail, 489 F.2d 983 (7th Cir. 1973) 13

United States v. Doe, 19 F.R.D. 1 (E.D. Tenn. 1956) 7

Page

United States v. Gianaris, 25 F.R.D. 194 (D.D.C. 1960) 7

United States v. Halsey, 257 F. Supp. 1002 (S.D. N.Y. 1966) 13

Weeks v. United States, 232 U.S. 383 (1914) 5,16

Other Authorities:

Note, Testing the Factual Basis for a Search Warrant, 67 Col. L. Rev. 1529, 1530 (1967) 10

Kamisar, LaFave, Israel, Modern Criminal Procedure 1237-38 (1974) 13

Perkins, R. Criminal Law 454, 456, 458-60 (2d ed. 1969) 12

Model Code of Pre-Arraignment Procedure, Section SS 290.3(1)(b) 13

United States Constitution, Article I, §9. 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5176

JEROME FRANKS,

Petitioner,

v.

THE STATE OF DELAWARE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF DELAWARE

BRIEF FOR PETITIONER

CITATION TO THE OPINION BELOW

The opinion of the Supreme Court of the State of Delaware is reported at 373 A.2d 578 (1977), and is set out in the Appendix (A. 38-40).

JURISDICTION

The jurisdiction of this Court is invoked on the basis that a right, privilege or immunity is claimed under the United States Constitution, and the decision in the Supreme Court of the State of Delaware was against the right, privilege or immunity.

The judgment in the court below was entered on May 2, 1977. No order respecting a rehearing nor any order granting an extension of time within which to petition for Certiorari was granted. The petition was filed on July 29, 1977. Certiorari and leave to proceed in forma pauperis were granted on October 11, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION

The Constitutional provision which the case involves is the Fourth Amendment to the United States Constitution, which reads as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This provision is found in Volume 1, page XLVIII of the Official Edition.

The case further involves the Fourteenth Amendment to the United States Constitution, Section 1, which reads as follows:

> "All persons born or in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This provision is found in Volume 1, page XLIX of the Official Edition.

QUESTION PRESENTED

Did the Trial Court, in refusing to hear testimony at a suppression hearing which would have shown to be untruthful certain averments of an affidavit made in support of a search warrant, act contrary to the Fourth Amendment of the United States Constitution?

STATEMENT OF THE CASE

The Petitioner appealed his conviction of First Degree Rape, Second Degree Kidnapping, and First Degree Burglary, on the ground that the Trial Court erred in refusing to hear certain testimony at a suppression hearing. The conviction was affirmed on appeal by the Delaware Supreme Court (A. 38).

According to the victim, she was confronted in her home, at about 5:00 a.m., by a knife-wielding assailant who forced her to perform multiple acts of sexual

intercourse with him. The victim later described to the police the clothing worn by the assailant, and identified the Petitioner as the assailant. (A. 39).

A search warrant was obtained by the police and used to seize articles of Petitioner's clothing and a knife. (A. 5). A motion to suppress the items seized in the search was filed by the defendant (A. 11). At the subsequent suppression hearing the Trial Court refused to hear the testimony of two witnesses to impeach the veracity of the affidavit used to establish probable cause for the issuance of the search warrant. (A. 14). The items seized in the search were received in evidence at trial over Petitioner's objection. (A. 24-32).

SUMMARY OF THE ARGUMENT

This Court has previously concluded that evidence seized in violation of the Fourth Amendment must be excluded from Federal and State Courts. Search warrants based on affidavits containing willful or negligent misstatements do not satisfy the Fourth Amendment requirement of probable cause. The evidence seized pursuant to such warrants should therefore similarly be excluded, since no alternative remedy would satisfy the Constitutional purpose. At a suppression hearing, the defendant should be afforded a full opportunity to expose such misstatements, as opposed to the heretofore limited right in many jurisdictions to attack only the sufficiency of the averments of the affidavits.

ARGUMENT

I.

EVIDENCE SEIZED CONTRARY TO THE FOURTH AMENDMENT CANNOT BE INTRODUCED AT TRIAL.

This Court, in *Weeks v. United States*[1] and *Mapp v. Ohio,*[2] required the exclusion from Federal and State Courts, respectively, of evidence seized in violation of the Fourth Amendment to the U.S. Constitution. That Amendment prohibits "unreasonable searches" and declares that "...no warrants shall issue, but upon probable cause, supported by oath or affirmation...".

In the *Mapp* case, in affirming the applicability of this Exclusionary Rule to the States, this Court said,

> "Because [the Fourth Amendment] is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment."[3]

---

[1] 232 U.S. 383 (1914).

[2] 367 U.S. 643 (1961).

[3] *Supra* at 367 U.S. 660.

II.

FALSE AFFIDAVITS SUPPORTING A SEARCH WARRANT DO VIOLENCE TO THE FOURTH AMENDMENT AT LEAST EQUAL TO THE INSUFFICIENCY OF A SEARCH WARRANT AFFIDAVIT.

The function of the Bill of Rights in general and of the Fourth Amendment in particular is to chart a course between a free society and a safe one.[4] If the members of a society never inflicted injury, all searches and seizures could be prohibited as pointless intrusion into personal liberty. However, in the interest of a safe society, some searches and seizures must be tolerated as a necessary evil. The Fourth Amendment limits those intrusions to situations where probable cause exists.

In accordance with Delaware practice and Rule 41(e)(4) of the Federal Rules of Criminal Procedure, an aggrieved person may move to suppress evidence on the basis that there was not probable cause for believing the existence of the grounds on which the warrant was issued. Reason dictates that a determination of probable cause would involve the exploration of the accuracy as well as the sufficiency of the allegations in a supporting affidavit. However, many State Courts have disallowed any challenge to the factual validity of an affidavit supporting a search warrant, and a number of Federal Courts have held that a finding of probable cause by a United States Commissioner is conclusive unless arbitrary, and thus not subject to challenge on the basis of

[4] *Gerstein v. Pugh*, 420 U.S. 103, 112-114 (1975).

the supporting affidavit's inaccuracy.[5] Other decisions, more in keeping with the fundamental purpose of the Fourth Amendment, conclude that "False facts given by the affiant will vitiate the warrant and the search."[6]

The fundamental purpose of an affidavit in support of a search warrant is to provide the basis for determining whether probable cause for the requested search actually exists. Just as this determination cannot be made from a facially insufficient affidavit, the magistrate cannot make the requisite determination of probable cause on the basis of a facially sufficient but misrepresentative affidavit.[7] Both sufficiency and accuracy of the affidavit are therefore necessary to meet the Fourth Amendment requirement of probable cause.

III.

JUDICIAL REVIEW OF THE TRUTH OF AN AFFIDAVIT SUPPORTING A SEARCH WARRANT IS ESSENTIAL TO GIVE MEANING TO THE FOURTH AMENDMENT GUARANTEES.

Our judicial system is based on the wisdom and inherent fairness of an adversary proceeding; one in

[5] *Kenney v. United States*, 157 F.2d 442 (D.C. Cir. 1946); *Gracie v. United States*, 15 F.2d 644 (1st Cir.), cert. denied, 237 U.S. 748 (1926); *United States v. Gianaris*, 25 F.R.D. 194 (D.D.C. 1960); *United States v. Doe*, 19 F.R.D. 1 (E.D. Tenn. 1956).

[6] *King v. United States*, 282 F.2d 398, 400 (4th Cir. 1960).

[7] *State of New Hampshire v. Spero*, 371 A.2d 1155, 1158 (1977).

which both parties in interest have the opportunity to present their case to an impartial trier of fact. The concept of a final *ex parte* proceeding was so repugnant to the framers of our Constitution that they included specific prohibitions against bills of attainder[8] that had been so cruelly misused in the past.

The initial hearing for the granting of a search warrant is necessarily an *ex parte* proceeding. Prior notice of a hearing regarding the initial granting of a search warrant would undoubtedly result in the removal or destruction of evidence. In this *ex parte* proceeding, however, a judicial determination is made regarding probable cause. The Constitution requires that probable cause exist. This necessarily means that the granting of the search warrant entails a determination of both the sufficiency and accuracy of the allegations in the application. The suppression hearing is the only opportunity that the defendant has, in his criminal proceeding, to present evidence negating that previously offered by the State about the accuracy of these allegations.

As discussed in a dissenting opinion by Mr. Justice Schaefer of the Illinois Supreme Court,

> "If there can be no subsequent inquiry into the truth of those facts [relied upon to establish probable cause], the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,' is protected only by an unreviewable ex parte determination of the lowest officer of the judicial hierarchy.... I cannot bring myself to believe that

[8]United States Constitution, Article I, §9.

> this was the probable cause, supported by Oath required by the Fourth Amendment."[9]

It is submitted that the relegation of such an important facet of the determination of a probable cause to a final, *ex parte* procedure is contrary to our adversary judicial system and a fundamental concept of fairness.

IV.

THE ARGUMENTS ADVANCED AGAINST SUCH REVIEW FAIL TO WITHSTAND SCRUTINY.

Of those cases which have denied the opportunity to challenge the truth and accuracy of the facts alleged in an affidavit, the reasoning supporting such holdings does not generally appear in the reported decisions. Typical is Tucker v. State of Maryland[10] in which the Court held simply that they were not persuaded that earlier cases were wrongly decided.[11] Another such decision was Smith v. State[12] in which the Court, without elaboration, held

> "The better rule seems to be that the court's consideration of the showing of probable cause

[9]People v. Mitchell, 45 Ill. 2d 148, 155, 258 N.E.2d 345, 349, certiorari denied, 400 U.S. 882, 91 S.Ct. 117 (1970).

[10]224 A.2d 111 (1966).

[11]*Ibid.*, page 118.

[12]191 Md. 329, 62 A.2d 287, cert. den. 336 U.S. 925, 69 S. Ct. 656 (1949).

should be confined solely to the affidavit itself, and the truth of the alleged grounds cannot be controverted, as was done in the instant case, by receiving the testimony of the accused and other witnesses."[13]

A variety of arguments have, however, been advanced against any judicial review of the truth of the allegations made in support of the search warrant.

It has been suggested that the warrant-issuing process so adequately protects Fourth Amendment values that review at a suppression hearing is unnecessary.[14] This reasoning ignores the realities of an *ex parte* proceeding, marked by haste, with no defense advocate present even to suggest that inquiry be made into the truth of a supporting affidavit.

Another argument against sub-facial attacks at a suppression hearing is that such review would destroy the solemnity of the warrant-issuing process and would result in the unseemly spectacle of one judge reviewing the decision of another.[15] The warrant-issuing process is, at best, no more solemn than any other judicial decision. Moreover, the truth of the allegations supporting a search warrant would, most often, be considered for the first time at a suppression hearing. The suppression of evidence on this ground would therefore be on the basis of the magistrate being deceived, rather than his having made a mistake.

---

[13]*Ibid.* 62 A.2d 289.

[14]*State v. Petillo*, 61 N.J. 165, 174, 293 A.2d 649, 653 (1972), cert. denied, 410 U.S. 945 (1973).

[15]Note, Testing the Factual Basis for a Search Warrant, 67 Col. L. Rev. 1529, 1530 (1967).

Still other arguments against sub-facial attacks are easily resolved by sound judicial procedure. It has been suggested that inquiry into the truth of the search warrant affidavit at a suppression hearing would confuse the defendant's guilt with the preliminary issue of whether someone misrepresented information in an affidavit.[16] Clearly, a jury should not be present during the course of a suppression hearing. The importance of protecting the identity of informants has also been advanced as a reason for limiting the scope of review of search warrant affidavits. This protection, where needed, can be afforded by review of witnesses *in camera*, with separate, confidential records of the proceeding.

V.

THE PROPOSED ALTERNATIVES TO A FULL ADVERSARY DETERMINATION OF PROBABLE CAUSE AT A SUPPRESSION HEARING ARE PATENTLY UNSATISFACTORY.

It has been suggested repeatedly that a defendant has a remedy against an officer who makes untruthful statements to support a search warrant, in that a criminal action for perjury or civil action for damages are available. However, this Court considered and rejected such arguments many years ago. Then, in reviewing whether it is necessary to exclude evidence obtained without a search warrant, Mr. Justice Black said, in *Mapp v. Ohio*,

---

[16]*Supra.*

> "There are, of course, other theoretical remedies. One is disciplinary action with the hierarchy of the police system, including prosecution of the police officer for a crime. Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates ordered."[17]

Moreover, the law of perjury would be clearly inapplicable to those search warrant affidavits that recount the observation not only of the affiant but of an informant who has given information to the affiant. If it is the informant who is the source of false information, the informant will not have given the information under oath, as the law of perjury requires.[18] Further, even if the affiant made the misrepresentations, the law of perjury would not deal with reckless or negligent misstatements.

VI.

A REQUIREMENT FOR A PRELIMINARY SHOWING OF FALSITY WOULD IMPOSE AN UNREASONABLE BURDEN ON A DEFENDANT.

Many of the courts that permit attack on the validity of a search warrant affidavit force the defendant to jump a preliminary hurdle. They refuse to give the

[17] *Supra*, note 2.

[18] R. Perkins, Criminal Law 454, 456, 458-60 (2d ed. 1969).

defendant a hearing unless he makes a preliminary showing that the hearing may be fruitful.[19] The requirement ranges in stringency from "... some initial showing of some sort – some suggestion of a basis or area of doubt ..."[20] to "a showing of falsity of allegation – a showing presumable not easily to be made in most cases."[21] The Model Code of Pre-Arraignment Procedure sets forth such a requirement as follows:

> "The moving party shall be allowed to make the contest ... only upon preliminary motion, supported by affidavit, setting forth substantial basis for questioning the good faith of the testimony, and such party shall have the burden of proving the lack of good faith."[22]

It is submitted that such a burden, in a typical case, would be unfair to a criminal defendant. In rare cases, the present one included, the defendant is prepared to go forward with concrete evidence of the falsity of one or more allegations of the affidavit. However, in most cases a defendant has neither specific evidence nor the means to get specific evidence of false allegations, since most jurisdictions do not permit discovery depositions in criminal cases.[23] A likely basis for many sub-facial

[19] *United States v. Belculfine*, 508 F.2d 58 (1st Cir. 1974); *United States v. Carmichail*, 489 F.2d 983 (7th Cir. 1973); *United States v. Halsey*, 257 F. Supp. 1002 (S.D. N.Y. 1966).

[20] *United States v. Halsey, supra.*

[21] *United States v. Belculfine, supra* at 508 F.2d 63 (1st Cir. 1974).

[22] Section SS 290.3(1)(b).

[23] Y. Kamisar, W. LaFave, J. Israel, Modern Criminal Procedure 1237-38 (1974).

attacks would be that the affiant misrepresented either the information conveyed by an informant or the informant's reliability. Absent compulsory process, such information is only available through examination of the affiant at a suppression hearing. A procedural requirement of a preliminary showing would therefore have the same effect, in such cases, as barring any sub-facial attack whatever. Such a situation would leave the defendant with a valid Fourth Amendment right but no means to enforce it.

VII.

THE EVIDENCE INTRODUCED IN VIOLATION OF THE PETITIONER'S FOURTH AMENDMENT RIGHTS SIGNIFICANTLY PREJUDICED HIS CAUSE.

In the application for the search warrant issued on March 9, 1976, eighteen facts were alleged to establish probable cause.[24] Of those eighteen facts, it is submitted that only three, Nos. 15, 16 and 17, would provide basis for the belief that physical evidence connected with the crime might be found in the searched premises. These three statements were based on alleged conversations with Mr. James Williams and Mr. Wesley Lucas. The defendant had, at the suppression hearing in the trial court, offered the testimony of witnesses to show that no such conversations took place.[25] Accordingly, the court's refusal to

[24] Appendix, pages 6-8.

[25] Appendix, pages 16-17.

hear such evidence bore on issues central to the sufficiency of the affidavit supporting the application for a search warrant.

As a result of the search carried out pursuant to the warrant in question, a knife and several articles of clothing were discovered which generally corresponded to the description of these items by the victim. At trial, they represented the only tangible evidence submitted to the jury. In view of the admission of this evidence, the defendant elected to present an affirmative defense at trial, giving up his right to rest on the insufficiency of the State's case.

CONCLUSIONS

If the Fourth Amendment is to succeed in its stated purpose of protecting the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .," a review of the validity of an affiant's allegations in addition to their sufficiency is required, in accordance with carefully reasoned opinions such as King v. U.S.[26] in which the court concluded, "The constitutional requirement of an oath or affirmation would be effectively eroded away if fictitious oaths were permitted."[27]

Innocent misrepresentations, to the extent that an affiant believed the misrepresentations to be true, do not do violence to the Fourth Amendment. However, it

[26] 282 F.2d 398 (1960).

[27] *Ibid.*, page 399.

is respectfully submitted that every material misstatement made either intentionally or negligently by an affiant should require exclusion of the evidence obtained as a result of such misstatement.

Over sixty years ago, this Court considered whether it was constitutionally permissible to introduce evidence obtained without a search warrant. Mr. Justice Day then concluded that if materials so obtained could be "used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures is of no value, and . . . might well be stricken from the Constitution."[28]

We might sympathize with an officer who enters without a warrant on the certain belief that the fruits or instruments of a crime lie within. How can we tolerate, however, the officer who would willfully or negligently advance a false statement to obtain a search warrant? Without a mechanism to guard against such abuse, our Fourth Amendment rights would very well be "of no value, and might well be stricken from the Constitution." Provisions for judicial review and exclusion of evidence are necessary to deter such intentional or negligent misstatements and to adequately preserve the constitutionally guaranteed rights against unreasonable searches and seizures.

In view of the central role of the evidence presently in question at trial, the Petitioner prays that the decision of the Delaware Supreme Court be reversed,

---

[28] *Weeks v. United States, supra*, note 1.

and that this case be remanded for further proceedings consistent with the requirements of the Fourth Amendment.

Respectfully submitted,

DONALD W. HUNTLEY
Legal Department
E. I. du Pont de Nemours & Company
Wilmington, Delaware 19898

Attorney for Petitioner